

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. LAWRENCE, JR.,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 97-CV-1824
	:	
CITY OF BETHLEHEM, WENDELL S.	:	
SHERMAN, in his official and	:	
personal capacities, and	:	
KENNETH R. SMITH, in his	:	
official and personal	:	
capacities,	:	
	:	
Defendants.	:	

Gawthrop, J. December , 1997

**M E M O R A N D U M**

Before the court are defendants' 12(b)(6) Motion to Dismiss, and their Motion for Sanctions against plaintiff's counsel. This case involves the termination of plaintiff's employment, wherein he alleges that the defendants infringed upon his constitutional rights, defamed him, and violated state laws, including the Whistleblower Act and wrongful discharge. Upon the following reasoning, I shall grant in part and deny in part the Motion to Dismiss, and I shall deny the Motion for Sanctions.

I. **BACKGROUND**

Before the termination of his employment, the plaintiff John J. Lawrence, Jr., held the position of chemist and municipal industrial pre-treatment plant ("MIPP") coordinator for a

wastewater treatment plant operated by the City of Bethlehem, Pennsylvania (the "City"). Among plaintiff's duties were the facilitating of permit and inspection procedures, and ensuring that the City complied with state and federal environmental regulations.

The wastewater treatment plant and its lab operated under a federally issued permit, called the National Pollutant Discharge Elimination System ("NPDES") permit, allowing the City to discharge wastewater into its rivers and streams. As part of the NPDES monitoring and reporting requirements, the plaintiff was directly involved in providing the monthly Discharge Monitoring Reports, which the City files with the Pennsylvania Department of Environmental Protection and the United States Environmental Protection Agency. Also required was the daily testing and analysis of water samples for Biochemical Oxygen Demand ("BOD") and fecal coliform levels.<sup>1</sup> The plaintiff and the defendant City, however, did not properly test and analyze the samples daily, or within the maximum holding times as required. This failure caused the results, and consequent reports on the monthly Discharge Monitoring Reports, to be false: the actuality was that the BOD and fecal coliform levels were reported as lower than they would have been if the rules had been followed in compliance with the NPDES permit.

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<sup>1</sup> Fecal coliform is a group of bacteria which includes E. coli, a pathogenic bacteria, which can cause serious, potentially fatal, illness if consumed by humans.

The submission of these false reports led to the United States Attorney's Office for the Eastern District of Pennsylvania ("USAO") bringing criminal charges against both Mr. Lawrence and the defendant City. The City pled guilty to three counts of intentional criminal violations of environmental protection laws, and Mr. Lawrence pled guilty to three counts of a criminal information charging him with negligently violating the Clean Water Act, 33 U.S.C. § 1319(c)(1)(A).<sup>2</sup>

Mr. Lawrence now brings this action against the City of Bethlehem, Mr. Wendell S. Sherman, the Director of Public Works for Bethlehem, and Mr. Kenneth R. Smith, Bethlehem's mayor. He alleges, in essence, that the defendants terminated him for providing information to the federal prosecutors investigating the violations related to the wastewater treatment plant, and for his refusal to cooperate with the defendant City in its own criminal case. (Complaint at p.1.) Already aware that there was an investigation underway, the City advised Mr. Lawrence to secure his own counsel, which he did, in anticipation of any

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<sup>2</sup> 33 U.S.C. § 1319(c)(1)(A) provides that:

Any person who negligently violates . . . of this title, or any permit, condition, or limitation implementing any of such sections in a permit issued under Section 1342 of this title by the administrator or by a state, or any requirement imposed in a pre-treatment program approved under Section 1342(a)(3) or Section 1342(b)(8) of this title . . . shall be punished by a fine of not less than \$2500. nor more than \$25,000. per day of violation, or by imprisonment for not more than one year or by both.

(The permit issued refers to the NPDES permit.)

criminal charges being brought against him. Mr. Lawrence avers that he provided requested information to the criminal investigators and, through counsel, engaged in communications with them regarding the potential violations of the Clean Water Act, 33 U.S.C. §§ 1319 et seq. He further alleges that the City threatened his continued employment, unless he cooperated with the City. Despite this threat, he followed counsel's advice and did not reveal to the City the content of his communications with the criminal investigators from the USAO.

The threats and coercion took the following course. The City instructed Mr. Lawrence to attend a meeting on February 4, 1997, during which the City solicitor and others intended to question him. His criminal counsel then advised him to not answer questions concerning the investigation, and that to do so, he would be waiving constitutionally based protections. At the meeting, he followed his counsel's advice by refusing to answer questions concerning the investigation, although he did offer to provide any information regarding his performance of job duties. Finally, Mr. Lawrence avers that the next day the defendant Wendell Sherman, acting in concert with defendant Kenneth Smith, terminated him, stating that his refusal to answer the questions put to him at the meeting led the City to conclude that Mr. Lawrence had not properly discharged his job duties. (See Complaint, ¶¶ 9-17.)

The complaint includes various counts alleging violations of his constitutional rights, namely the First, Fifth, Sixth, and

Fourteenth Amendments. It also includes state law counts of defamation, wrongful discharge and violation of the Whistleblower Act, 43 P.S. §§ 1421 et seq., and the whistleblower provisions of the Municipal Code, 53 P.S. § 4000.1714. In their Motion to Dismiss, the defendants, in addition to taking issue with the substance of each of the counts, argue that the plaintiff fails to frame his constitutional counts as actionable under 42 U.S.C. § 1983. Additionally, defendants contend that it was unreasonable and frivolous for plaintiff to have initiated this suit at all, since pled guilty to criminal violations resulting from his employment activities and involving the same events surrounding this suit. They therefore ask for sanctions against plaintiff's counsel.

## II. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Strum v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In so doing, the court must "consider only those facts alleged in the complaint and accept all of the allegations as true," ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994), and must view them in the light most favorable to the non-moving party. See Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal is appropriate only when it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conely v. Gibson, 355 U.S. 41, 45-46 (1957).

### III. Discussion

In Counts 1 through 4, entitled First, Sixth, Fifth and Fourteenth Amendment respectively, there is no mention of plaintiff's undertaking this action pursuant to 42 U.S.C. § 1983. Instead, the counts request declaratory relief -- presumably, under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq. Defendants, however, argue that the constitutional claims as a matter of law are insufficient because the City and the other defendants are potentially liable only pursuant to a § 1983 action, which plaintiff fails to include.

"When deciding a motion raising any of the enumerated Rule 12(b) defenses, the pleading will be read as a whole, and will be viewed broadly and liberally in conformity with the mandate in Rule 8(f)."<sup>3</sup> 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure Civil 2d, § 1363 at 463 (1990). Although there is no citation to § 1983 in the first four counts, the defendants' argument ignores several other relevant portions of the Complaint. Beginning with the opening paragraph, the Complaint expressly states that the plaintiff "brings this action to redress violation of constitutionally protected rights pursuant to 42 U.S.C. § 1983". In addition, Count 5 of the Complaint is captioned "§ 1983". There, the plaintiff lists all of the rights discussed in the first four counts as well as "the

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<sup>3</sup> Fed.R.Civ.P. 8(f) reads: "All pleadings shall be so construed as to do substantial justice."

right to procedural and substantive due process". I thus find that the Complaint sufficiently puts defendants squarely on notice that this is, at least in part, a § 1983 action.

Nevertheless, there is merit to the contention that the constitutional counts cannot be maintained separately from a § 1983 action. When a proper § 1983 action is included, a plaintiff cannot proceed under a separate constitutional count, if both depend on the same action. White v. Salisbury Twp. School Dist., 588 F.Supp. 608, n. 2 (E.D. Pa. 1984). When that happens, the constitutional claim is "wholly subsumed" by the § 1983 claim. Id. In Counts 1 through 4, plaintiff has asserted a direct cause of action under the Constitution, and in Count 5, a § 1983 claim, all based on the same events. Thus, I shall dismiss Counts 1 through 4, but not Count 5 (§ 1983).

Defendants next argue that even assuming plaintiff has brought this action pursuant to § 1983 the alleged violations are insufficient as a matter of law. I will therefore examine whether plaintiff's claims, properly brought as a § 1983 claim, are sufficiently pleaded.

#### First Amendment

The plaintiff's First Amendment claim stems from his communications with the USAO and his meeting with the defendants, wherein he alleges that the defendants attempted to coerce him into revealing what he told the USAO, and when he refused, they terminated him the next day. Defendants argue that if they had no actual or constructive knowledge that he had spoken with the

USAO, then plaintiff's freedom of speech could not be violated. But the record is unclear whether the defendants had such knowledge. The plaintiff avers that defendants did have knowledge, since he states that defendants attempted "to gain information regarding the confidential communications between his counsel and the United States Attorney's Office". (Complaint ¶ 26.) If defendants attempted to gain information about the communications, it is reasonable to infer that they had knowledge communications in fact occurred. Whether defendants had knowledge of plaintiff's discussions with the USAO is a question of fact, not yet subject to adjudication at this stage of the litigation. Accordingly, the motion to dismiss the First Amendment aspect of plaintiff's § 1983 claim will be denied.

#### Fifth and Sixth Amendments

Plaintiff claims that the defendants attempted to leverage their position as employer to force him to provide self-inculpatory information, this violating his Fifth Amendment protection against self-incrimination. Defendants respond that they did not violate the plaintiff's rights because they were plaintiff's employer, not his prosecutor, and this case is an employment matter, not a criminal one.

Discharge, however, is not allowed when the employee is forced to decide between his job and his right to refuse to answer questions which could subject him to legal sanctions. Garrity v. New Jersey, 385 U.S. 493 (1967); see also Portnoy v. Pennick, 595 F.Supp. 1000 (M.D. Pa. 1984). The allegation that

the defendants presented the plaintiff with an impermissible choice between his right to protect his job and his right to remain silent in the face of criminal charges is sufficient to plead a violation of the Fifth Amendment pursuant to § 1983.

Plaintiff's claims the defendants attempted to use their position as employer to make him reveal his protected communications with his counsel, and thus interfered with his Sixth Amendment right to effective counsel, likewise survives this Motion to Dismiss.

#### Fourteenth Amendment

The plaintiff alleges both procedural and substantive due process violations. Although it appears that Mr. Lawrence was an at-will employee, arguably with no property interest in continued employment, when termination amounts to a violation of his constitutional rights, the alleged conduct of the City of Bethlehem and its representatives is made actionable through the Fourteenth Amendment, and the remedy is provided through § 1983. See Hughes v. Bedsole, 48 F.3d 1376 n. 6 (4th Cir. 1995), cert. denied, \_\_\_U.S.\_\_\_, 116 S.Ct. 190, 133 L.Ed.2d 126 (1995) (The Fourteenth Amendment "merges into [a] § 1983 claim because § 1983 merely creates a statutory basis to receive a remedy for the deprivation of a constitutional right."). Thus, the Fourteenth Amendment is implicated in plaintiff's § 1983 claim.

#### Defamation

Defendants assert that plaintiff failed to plead with enough specificity in his defamation claim. In support, they cite to

Pennsylvania law and its pleading requirements for a defamation claim. See Moses v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988) ("A complaint for defamation must, on its face, specifically identify what allegedly defamatory statements were made, by whom and to whom."). However, federal procedural law controls here. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In particular, Federal Rule of Civil Procedure 8(a), and not Pennsylvania law, provides the standard of specificity applicable to plaintiff's defamation claim. See GE Capital Mortg. Serv. v. Pinnacle Mortg. Inv., 897 F.Supp. 854, 867 (E.D. Pa. 1995) (defamation need not be pleaded with particularity). Under this standard, the complaint does not have to include the precise defamatory statements, nor must it name specifically the person who made the statements. Lynch v. Borough of Ambler, No. Civ. 94-6401, 1995 WL 113290, \*5 (E.D. Pa. March 15, 1995) Rather, the complaint need only provide to defendants sufficient notice of the nature of the claim. Id.

The complaint alleges that "for a course of weeks at least, defendants published false statements, specifically naming plaintiff, to the effect that plaintiff was the sole or primary cause of the Defendants City of Bethlehem's being criminally charged . . . ." (Complaint ¶ 39.) It then lists examples of the false statements made. (Complaint ¶ 40.) In addition, plaintiff states that defendants are aware that the defamatory statements were made in the two daily newspapers in the Lehigh Valley area over a period of months. (Pl.'s Opp. Mem. Mot. to

Dismiss at 7.) Under the liberal pleading requirements of the Federal Rules, I find that the complaint puts the defendants on sufficient notice of the nature of the defamation claim, and therefore, the motion to dismiss this count will be denied.

#### Whistleblower Act

Defendants maintain that Count 8 alleging a violation of the Whistleblower Act should be dismissed because they had no actual or constructive knowledge of Mr. Lawrence's discussions with the USAO, and thus, he could not have been fired for this reason. One, however, could reasonably infer -- from the circumstances of the February 4, 1997 meeting and the fact that the City itself was under investigation -- that the defendants had some awareness of Mr. Lawrence's activities. Moreover, the plaintiff contends that it was his refusal to reveal the contents of his discussions which subjected him to termination. Thus, I find that this defense presents a question of fact which cannot be sustained on a motion to dismiss.

#### Wrongful Discharge

Finally, defendants maintain that the wrongful-discharge count should be dismissed because the plaintiff has failed to plead an exception to the doctrine that as an at-will employee he can be discharged without cause. I disagree. The Complaint does sufficiently plead an exception to this doctrine, in that constitutional violations, including violations of the First and Fifth Amendment, have been held to be actionable bases for a wrongful discharge claim. See Freeman v. McKellar, 795 F.Supp.

733 (E.D. Pa. 1992); Complaint ¶ 52.

Motion for Sanctions

Defendants argue that in light of the plaintiff's guilty plea of negligently violating the Clean Water Act, his position in the Complaint is untenable; in his guilty plea, plaintiff did admit to knowing that the BOD and fecal coliform testing was conducted in violation of federal law, and that he did not take immediate steps to correct the violations. They also assert that the investigation by plaintiff's counsel was rushed and slipshod, and that it appears counsel relied solely upon her client for information, whereas a reasonable investigation would have shown this suit to be meritless. Thus, defendants assert that bringing and continuing a frivolous suit is an unreasonable act, calling for the imposition of Rule 11 sanctions against plaintiff's counsel.

As discussed above, I find that, at this point, there is an apparently reasonable basis for plaintiff's claims. The Complaint can be read such that it does not contradict the admissions in the plaintiff's guilty plea. In paragraph 8 of the Complaint, plaintiff states that "[a]t all times, [he] performed his job duties competently, and within the requirements of Defendants." (See also Complaint ¶ 18.) This seemingly contradicts the guilty plea admission that plaintiff acted negligently. Plaintiff responds that there is no contradiction, but rather, the guilty plea "simply underlies the impossibly difficult position in which he was placed by the City's failure

to provide him the resources he repeatedly sought to do his job in compliance with all legal requirements." (Pl.'s Opp. Mem. Mot. for Sanctions at 2.) Even though plaintiff admitted to criminal negligence, this does not detract from his allegation that the reason for his termination was his refusal to cooperate with the City in its own defense. Indeed, the plaintiff argues that the City has cast him in the role of scapegoat for its own faults. If proven, it is arguably a meritorious claim against the defendants. Nor do his arguably unclean hands as to the unclean water necessarily bar his recovery. See, e.g., Paolella v. Browning-Ferris, Inc., 973 F.Supp. 508, 512-13 (E.D. Pa. 1997) (participation in criminal activity did not bar plaintiff's recovery for wrongful discharge). A determination about these factual issues is premature, and accordingly, at this stage in the litigation I shall deny the motion for sanctions.